No. 73

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

UNITED STATES OF AMERICA,
Appellant,

vs.

THE STATE OF MISSISSIPPI et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

BRIEF FOR THE STATE OF MISSISSIPPI

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PRELIMINARY STATEMENT

Because the position of the Appellee, The State of Mississippi, as to the matters presented herein, is entirely different from the position of any other Appellee in this action, this separate brief is presented. The State of Mississippi adopts the briefs of the other Appellees in response to the remaining points of argument raised on this appeal.

SUMMARY OF THE ARGUMENT

I.

The State of Mississippi Was Neither a Proper nor a Necessary Party to This Action.

A. The State of Mississippi did not enforce or execute the provisions of any statute alleged to be unconstitutional. The statute, 28 *U.S.C.* 2281, under which the District Court was convened, contemplates and embraces only actions against officers of the State who are enforcing or executing allegedly unconstitutional statutes.

B. The joinder of The State of Mississippi as a Defendant in the action involved in this appeal is not within the contemplation of 42 *U.S.C.* 1971. This statute is directed only to a *person* who is engaged, or about to engage, in an act or practice which would deprive an otherwise qualified citizen of the United States of the right to vote on the basis of such citizen's race or color. The State of Mississippi is not a "person" within the meaning of the statute. The action contemplated by § 1971 is, by its precise terms, a "proper proceeding for preventive relief" against "an *official* of a state or subdivision thereof." Any unconstitutional Constitution, laws, customs, usages or regulations of a State are not even to be considered in such an action. Subsection (e) of § 1971, by its express terms and definition, also delineates the civil action authorized to be an action against an official acting within a *subdivision* of a state. Read as a whole, as it must be, the statute is replete with indications that it contemplates preventive relief against individual, personal acts under color of law. The statute's permission to *join* the State in the principal action directed against an individual official was not intended to create a right of action against the Sovereign State, but was intended to be a

remedial procedural device to make effective preventive relief that would otherwise be granted against offending *individual persons,* if such individual became unable or unwilling to function. The only action which this section permits to be *instituted* against a State is an action brought where neither the individual officer allegedly engaged in prohibited acts or practices, nor any successor, is available to be sued. The legislative history of § 1971, and particularly the last sentence of subsection (c), clearly negates the Attorney General's topsy-turvy claim of a right to *institute* the present action against The State of Mississippi and *join* various registrars as appendages to that proceeding.

C. No proper preventive relief could be granted against the sovereign State. Injunctions look only to the future. Injunctive relief addressed to the State would continuously presume that the State will, unless enjoined, commit a future violation of constitutional rights, which it is incapable of doing. Such a presumption of future wrongdoing is contrary to every established rule of law. If agents of the State act contrary to its laws and the Constitution of the United States, they are not acting in concert or participation with the State and, in fact, are no longer its agents and thus would not be subject to an injunction order directed to the State. An abstract injunction addressed to the State means nothing, for the State acts only through *persons* who compose the legislative, executive and judicial branches thereof. An action for proper preventive relief against individual officials and their successors shown to be acting contrary to their authority from the State and unconstitutionally, is the only *effective* action and is the only action contemplated or permitted by § 1971.

II.

The Presence of the State of Mississippi As a Defendant Raises Serious Questions As to the Constitutionality of § 1971 under the Construction Contended for by the Government Which Can and Should Be Avoided in the Present Action.

A. Congress cannot blind the courts to their duty to properly exercise the judicial power with which they are invested by legislatively pronouncing a non-existent legal relationship as "deemed" to exist. The last sentence of § 1971 (c) requires the court to *conclusively* accept as a fact that which is not and cannot become a fact. It attempts to breathe life into a void act or deed, transport its effect to a sovereign State and, by that means, condemn the State. The effect of this attempted invasion of the judicial power would also be to impute a crime to a sovereign State through the creation of a fictitious agency relationship, since any individual act sufficient to invoke the provisions of § 1971 would likewise violate 18 U.S.C., § 242. To hold that a criminal act can be so "deemed" the act of the State, would be to allow the sovereign State to be made a criminal by the action of an individual acting contrary to his statutorily defined duties.

B. *There is no such thing as a bad state.* Within their respective spheres of authority, the individual states are equally as sovereign as the limited government of the United States. There is a significant legal difference between the group of individuals who compose the government of a State and the State itself. While these individuals are capable of committing acts within the ambit of "State Action", they are incapable of binding the ideal person of the State itself by their lawless usurpation. To

characterize this firmly entrenched and long-honored judicial distinction as a mere "convenient collective" or "short-hand", as the government has done, or trite "Eleventh Amendment dialectic", as the minority opinion did below, is to impute to this court and every other court which has announced and followed this rule, an intention to commit an ingenious or sophisticated violation of the clear thrust of the Constitution.

C. The Court will not anticipate a question of constitutional law in advance of the *necessity* of deciding it.

It is likewise committed to restricting its constitutional decisions, whether in favor of constitutionality or nullification, to cases between adversary parties which present a precise set of facts to which such decision is to be applied. The Court has consistently refused to allow parties to conjure up hypothetical cases which may turn out to provoke premature or overly broad interpretations. These rules govern where, as here, effective ways are readily available to determine the controversy presented without delving into speculation or hypothesis.

The judgment of the District Court dismissing this action as to the Defendant, The State of Mississippi, was correct and should be affirmed.

ARGUMENT

I.

The State of Mississippi Was Neither a Proper nor a Necessary Party-Defendant in Action.

A.

The State of Mississippi Is Not a Proper Defendant Within the Contemplation of 28 U.S.C., § 2281.

Section 2281 provides that only a three-judge district court composed as required by Section 2284 of the same title, may adjudicate a State statute unconstitutional. That same section defines the relief which may be sought from such a special three-judge court as an interlocutory or permanent injunction:

> ". . . restraining the action of any *officer* of such State in the enforcement or execution of such statute. . . .".

The statute only provides for a suit against the enforcing officer of such State—not against the sovereign State.[1]

These special three-judge courts, just as every Federal court inferior to this Supreme Court, are courts of special and limited jurisdiction. These courts must find authority for all they do in the express language of Congressional enactments or by necessary implication therefrom.[2]

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1. *Fitts* v. *McGhee*, 172 U.S. 516.

2. *Cumberland Telephone and Telegraph Co.* v. *Louisiana Public Service Commission et al.*, 260 U.S. 212, 216, 217; *Ayrshire*

In the *Cumberland* case the Court, referring to the predecessor of the present three-judge statute, said:

> "This is a question of statutory power and jurisdiction, not one of judicial discretion or equitable consideration."

This Court, in the *Cary* case, said:

> ". . . the courts created by statute, must look to the statute as the warrant for their authority; certainly they cannot go beyond the statute, and assert an authority with which they need not be invested by it, . . ."

The general grant of jurisdiction to United States District Courts over civil actions commenced by the United States, in 28 *U.S.C.* 1345, does not in any way broaden the strict and technical interpretation which this court has held should be given to § 2281. Judge Cameron in the majority opinion below, summarized this Court's holdings as to the proper construction of § 2281 thus:

> "Three-Judge courts constitute a unique burden on the Federal Judiciary. To keep this burden to a minimum, the statutes vesting the right to call such courts to sit in judgment of constitutional challenges are to be strictly construed as a procedural technicality and not as a broad remedial social policy. See *Phillips* v. *United States*, 312 U.S. 246; *Stainback* v. *Mo. Hock Ke Lok Po*, 336 U.S. 368; and *Kesler* v. *Dept. of Public Safety*, 369 U.S. 153."[3]

No case cited in the brief for the United States or disclosed by our research has ever expressly recognized any

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Collieries Corporation et al. v. *United States et al.*, 331 U.S. 132, 138, 139; *United States* v. *Hudson and Goodwin*, 11 U.S. (7 Cranch) 32, 33; *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 246; cf. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 551, 552.

3. R. 1533, 4.

authority under § 2281 to bring an action against a State in its governmental capacity. The point does not appear to have been specifically raised in the case of *United States* v. *Louisiana*.[4] All other such actions seeking to enjoin actions of State officials on the grounds of statutory unconstitutionality have been brought, as the statute plainly authorizes, against those officials who actually enforce the allegedly offensive statute. The fact that the government of the United States brings the action cannot change the wording of the statute on which it relies.[5]

B.

The State of Mississippi Is Not a Proper Defendant Within the Contemplation of 42 U.S.C., § 1971.

This statute has had a long and varied history. It had its origin in the Force Acts[6] produced by the Reconstruction Congress. A number of its sections relating to registration and other procedures were later repealed or declared unconstitutional[7] but subsection (a) of the present statute relating to the act of voting has remained intact through the years.[8] A portion of the present section was added by the Civil Rights Act of 1957,[9] a part was added by the Civil

4. 225 F. Supp. 353.

5. Cf. *Jones et al.* v. *Watts, Clerk, et al.*, 142 F.2d 575, 163 A.L.R. 240.

6. Act of May 31, 1870, 41st Congress, 2nd Session, Chapter 114, 16 *Stat. at L.* 140.

7. *U. S.* v. *Reese*, 92 U.S. 214; *U. S.* v. *Lackey*, (6 Cir.) 107 Fed. 114; *Karem* v. *U. S.*, (6 Cir.) 121 Fed. 250; and *U. S.* v. *Sanges*, (5 Cir.) 48 Fed. 76.

8. For a complete history, see Section V of Judge Cameron's dissent in *United States* v. *Alabama*, 304 F.2d 583, 601.

9. Act of Sept. 9, 1957, *Public Law* 95-315, Part. IV, § 131, 71 *Stat.* 637.

Rights Act of 1960,[10] and a part was added after this case was decided by the Civil Rights Act of 1964.[11]

In all of its versions, the thrust of this statute has been directed expressly or by judicial construction to "persons" —State officials or individuals acting under color of law— allegedly engaged or about to engage in an act or practice which would deprive "otherwise qualified" citizens of the United States of the right to vote on the basis of their race or color.[12] The State of Mississippi is not a "person".[13]

Section 1971 throughout makes it patent that the action it authorizes is an action against individual State officials, not the State itself. Indeed, the right defined and secured by subsection (a) expressly *excludes* "any constitution, law, custom, usage or regulation of any State." In subsection (c) the statute speaks not only of "person" but also of proceedings wherein "any official of a State or subdivision thereof" is alleged to have committed a proscribed act or practice. Subsection (d) exempts the individual whose rights are being asserted from having to *exhaust* remedies which the State law provides for his protection.[13a] Under subsection (e), the Attorney General is required to transmit copies of the court's order to "appropriate election officers" not *all* such officers. This same subsection speaks of an

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10. Act of May 6, 1960, *Public Law* 86-449, Title IV, § 601, 74 *Stat.* 90.

11. Act of July 2, 1964, *Public Law* 88-352, Title I, § 101, 78 *Stat.* 241.

12. *United States* v. *Raines*, 362 U.S. 17.

13. *United States* v. *United Mine Workers*, 330 U.S. 258; *Monroe* v. *Pape*, 365 U.S. 167; see also the authorities cited and reasoning by Judge Cox in his concurring opinion, R. 1612, 1613.

13a. We cannot agree that these words free the litigant from even *commencing* or reasonably *pursuing* these remedies when they may provide a State remedy for a State error.

"affected area", and defines this term to mean "any *subdivision* of the State" where violations of the section have been proven. Each of these provisions is inconsistent with the position that the statute authorizes the assertion of an action against the State, except under the limited conditions prescribed in the last sentence of subsection (c) which were not present in this case. Subsection (f) relating to contempt, refers, as it must, exclusively to a "person" and uses the masculine pronoun throughout.

Statutes must be read with a due regard to the whole law and their meaning must be fairly interpreted from the entirety of the statute.[14] When this is done, § 1971 can be seen even more clearly to provide for preventive relief against individual, personal acts under color of law. The statute's permission to *join* the State in the principal action against the individual official, was obviously not intended by Congress to create a right of action against the sovereign State. The legislative history of the 1960 amendment discloses no such intention. Congressman McCulloch, who introduced the legislation which contained the reference to the joinder of the State, explained:

> "Mr. McCulloch. Let me say the way the gentleman has presented the matter is accurate. But I want to say this, and I want you to note the significance of what I am going to say. When the Attorney General brings that case into the Federal Court, with all of the authority and solemnity with which a case in a Federal Court is brought, *there is a naming of defendants, and they are State officials.* In that suit, the Attorney General of the United States must prove to the satisfaction of the Federal Court that there is a pattern or practice in the political subdivision in ques-

14. *United States* v. *The Heirs of Boisdore*, 49 U.S. (8 How.) 113; *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 285; *Richards* v. *United States*, 369 U.S. 1.

tion which denies people otherwise qualified, the right to vote by reason of race or color. So there has been *a day in court of the person* who could controvert by evidence that which is stated in the complaint by the Attorney General."[15]

In the hearings before the Committee on the Judiciary of the United States Senate on March 28 and 29, 1960, the Attorney General who sponsored the legislation stated:

> "Mr. Rogers. No, Senator; you see this is merely implementation of the Civil Rights Act of 1957, and under the Civil Rights of 1957 that determination of discrimination is made by the judge. And if Congress enacts this bill, the judge would make the determination as to whether a pattern or practice of discrimination existed *in that judicial district* or not."[16]

Judge Walsh, his deputy, took the same position.

> "Senator McClellan. How can you establish a practice by just one single act or one or two acts, is what I am trying to find out.
>
> Mr. Walsh. Well, the number of individual acts related to a single election would vary. I do not know how many there would be.
>
> The Chairman. Would that be in a county now or a judicial district?
>
> Mr. Walsh. It could be either one—really, *it would relate to the area administered by the single officer.*
>
> The Chairman. You mean by the judge, the district judge?
>
> Mr. Walsh. No, I was thinking of *the State officer,* Senator, Mr. Chairman."[17]

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15. 106 *Congressional Record* 5487, 86th Congress, Second Session, 1960.

16. Report of Hearings before Committee on Judiciary, U. S. Senate, March 28 and 29, 1960, p. 15.

17. *Idem.*, p. 69.

This particular amendment was intended to be a remedial procedural device to make effective preventive relief against offending individual persons in those rare situations where the individual officer might become unable or unwilling to function. This is the interpretation given this act by the courts when the point was properly raised. In *United States* v. *Atkins*[18] the Fifth Circuit ruled that a general injunction should have been ordered against the registrar and, in a footnote to the ruling, stated:

> "That injunction should be addressed to the Registrars and their successors in office, but, so long as there is a functioning Board of Registrars, it should not be addressed to the State. *If a State can properly be enjoined* . . . that should be done only when absolutely essential to afford effective relief."

This holding has been followed in *United States* v. *Ramsey*[19] in affirming the dismissal of the State as a party.

If the federal Attorney General's contention that permission to *join* the State was intended by Congress to create an independent right to *institute* a suit against the State as a type of joint tort-feasor, then it would have been excess verbiage for Congress to add the clause permitting institution of an action against the State where the individual enforcement official was no longer available. In the words of a homely, but apt analogy—should Congress be held to have cut a big hole in the fence for big cats then added a little hole for lesser felines? Such a construction is condemned.[20]

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18. 323 F.2d 733, 740.

19. (5 Cir.) 331 F.2d 824.

20. *Washington Market Company* v. *Hoffman*, 101 U.S. 112, 115; *Jarecki* v. *Searle & Co.*, 367 U.S. 303, 307.

In the brief for the United States (p. 59) the position was taken that this Court's affirmance of the case of *U. S.* v. *Alabama*, 371 U.S. 37, constituted an "implied" approval of the joinder of a State in an action where registrars were in office and amenable to suit. This case was No. 19051 in the 5th Circuit. An examination of all of the briefs and the opinion of the Fifth Circuit in this case disclosed that no question as to the propriety or the constitutional validity of joining the State in such circumstances was raised or discussed. The same case on appeal to this Court was No. 324, October Term, 1962. Again in this Court the question of the propriety or constitutionality of the joinder of the State was not raised. The petition for a writ of certiorari on page 2 thereof phrased the sole question before this Court as a question of whether or not the District Court could affirmatively order *"a board of registrars"* to order specified names of negro citizens placed upon the list of registered voters. It did not discuss the joinder of the State. This question was not discussed in the Brief for the United States in Opposition filed in this Court by the same Solicitor General Cox, Assistant Attorney General Marshall, and Assistants Greene and Rubin who are of counsel here. Neither this Court's nor the Fifth Circuit's opinions are implied authority for this point.

Common sense, the legislative history of § 1971, and every principle of statutory interpretation clearly negate the Attorney General's topsy-turvy claim of a right to *institute* the present action against The State of Mississippi, and *join* various individual officials as mere appendages to that state-wide proceeding. Neither logic nor precept support this type of circular reasoning.

C.

No Proper Preventive Relief Could Be Granted Against the Sovereign State.

The authority extended to the Attorney General by Congress in § 1971 extends only to the institution of a "*proper* proceeding for *preventive* relief" and it is only to such a proceeding against an individual that the State may be joined, under the last sentence of subsection (c) thereof. Congress did not attempt by this sentence to legislatively create a new type of judicial proceeding unknown to the judicial power. The authorization extended was for the institution of procedures which were judicially *proper* in accordance with established usages of law and equity.

The Complaint, as filed, sought a purely equitable remedy—that of an injunction. As to The State of Mississippi, the cause of action defined by the complaint lacked many, if not most, of the basic equitable principles which the courts of the United States inherited from the courts of England when their existence was created by the Constitution.[21]

A most basic principle of equity jurisprudence which is violated as to the sovereign State is the well-articulated rule that injunctions—the strong arm of equity—look only to the future.[22] The moving party must satisfy the court that such an order against a defendant not only is necessary, but that a threatened and impending injury can *only* be prevented by enjoining that defendant.[23]

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21. *Liberty Oil Company* v. *Condon National Bank et al.*, 260 U.S. 235; *Atlas Life Ins. Co.* v. *W. I. Southern, Inc.*, 306 U.S. 563, 568.

22. *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 464; Cf. *Douglas* v. *City of Jeannette*, 319 U.S. 157.

23. *Truly* v. *Wanzer*, 46 U.S. (5 How.) 141; *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633.

Inasmuch as an injunction addressed to a sovereign State looks to the future, the court granting such a writ must continuously presume that such sovereign will, unless the injunction is issued and continued, commit future violations of constitutional rights. Every State is, by the very nature of our Union, and under the uncontroverted decisions of this and every other Federal Court in which the question has been raised and decided, an ideal being, a perfect representative incapable of any such wrongdoing.[24]

The theory of the complaint as it seeks an injunction against the sovereign State requires a presumption of intentional, purposeful wrongdoing which is the reverse of every established principle and presumption of law.[25] If officers of a State, who derive their power to perform "state action" only from express statutes, act contrary to those statutes and the Constitution of the State, and contrary to the Constitution of the United States, such agents have departed not only from their office but also have lost even apparent authority to bind the sovereign.[26]

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24. Examples of the numerous holdings of this Court affirming this rule are the following cases: *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316; *Osborne* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738; *Texas* v. *White*, 74 U.S. (7 Wall.) 700; *Ex parte Virginia*, 100 U.S. 339; *Poindexter* v. *Greenhow*, 114 U.S. 270; and *Ex parte Young*, 209 U.S. 123.

25. *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 751; *Ex parte Mitsuye Endo*, 323 U.S. 283, 300; *Lindsley* v. *Natural Carbonic Gas Company*, 220 U.S. 61; *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483; *Snowden* v. *Hughes*, 321 U.S. 1, 8. Cf. *Watson et al.* v. *Buck et al.*, 313 U.S. 387, 400.

26. *Goltra* v. *Weeks, Secretary of War, et al.*, 271 U.S. 536, 544, 545.

Such false acts cannot be imputed to the State under any rule of agency or constitutional law.[27]

It is elementary injunction law that injunctions do not bind persons who are not acting in concert or in participation with the parties enjoined. Therefore, if a State official so far violates his statutory duties as to lose his identity and immunity as an agent of the State, even though he might violate rights specifically encompassed by an injunction order addressed to the State, he would be a stranger to the injunction itself and not subject to proceedings for enforcement or contempt. An injunction cannot be issued which is so broad as to make punishable the conduct of persons who act independently of the parties to the litigation.[28]

The court should also consider that an injunction directed against The State of Mississippi would constitute the invasion of a vital attribute of the sovereignty of the State. The government's prayer for relief clearly acknowledges the "need" for this when it requests the court to mandatorily enjoin The State of Mississippi to register, not all citizens, but *only Negroes* who possess certain delineated qualifications which the Attorney General thinks would be suitable, to-wit: (a) Age; (b) Residency; (c) Literacy; (d) Mental capacity; and (e) Lack of certain criminal convictions. This "suggestion" is a palpable invasion of the prerogative which, subject to specific con-

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27. *Whiteside* v. *United States*, 93 U.S. 247, 256, 257; *United States* v. *Lee*, 106 U.S. 196, 219, *Georgia Railroad and Banking Co.* v. *Redwine*, 342 U.S. 299, 304. See also *Larsen* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 701.

28. *Scott* v. *Donald*, 165 U.S. 107; *Alemite Mfg. Corp.* v. *Staff*, 42 F.2d 832. See also *Regal Knitwear Co.* v. *National Labor Relations Board*, 324 U.S. 9 and *Chase National Bank* v. *Norwalk*, 291 U.S. 431.

stitutional provisions and limitations, belongs to the States—*i.e.* to determine the qualifications of voters.[29] This court has just recently reaffirmed its unwavering recognition of the basic right of the states to fix the qualifications of voters, in *Reynolds* v. *Sims*,[30] by recognizing that the equal protection clause of the 14th Amendment of the Constitution of the United States extends to "*qualified* voters" in State elections—a clear reference to and presumption of *qualification by State law*.[31]

For all of the foregoing reasons, an injunction in the abstract addressed to the State would have been *brutum fulmen*. It could provide no effective preventive relief against interference with the personal right of a qualified citizen to vote. The State acts through persons who compose its legislative, executive and judicial branches. These are the parties to whom effective, proper preventive relief can and must be addressed—a proper order specifically addressed to individual officials who perform acts under color of authority from the State, and to their successors in office, is the only effective preventive relief available. The State of Mississippi was neither a necessary nor a proper

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29. *Minor* v. *Happersett*, 88 U.S. 162; *United States* v. *Reese*, 92 U.S. 214; *Ex parte Yarbrough*, 110 U.S. 651; *McPherson* v. *Blacker*, 146 U.S. 1; *Mason* v. *Missouri ex rel. McCaffery*, 179 U.S. 328; *Pope* v. *Williams*, 193 U.S. 621; *Guinn* v. *United States*, 238 U.S. 347; *Breedlove* v. *Suttles*, 302 U.S. 277; *United States* v. *Classic*, 313 U.S. 299; *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45.

30. 377 U.S. 533, 12 L. Ed. 2d 506, 523.

31. The Constitution impliedly recognizes that a State may have more than one standard of qualifications applicable to different elections by specifying *which* qualifications may be applied to elections for members of the House of Representatives (Article I. Section 2, Clause 1), and for members of the Senate (the 17th Amendment).

party-defendant to this proceeding for the granting of such relief.

This court has affirmed what every free man hopes—that the government of the United States is a government of laws and not of men.[32] Its authority is defined and limited by the Constitution.[33] That document is a law for rulers and people alike.[34] Supposedly beneficent aims, however great or well directed, can never serve in lieu of constitutional powers.[35] The history of the origin and ratification of the Constitution discloses no intention for that document to furnish a corrective for every conceived abuse of the powers retained by the State governments.[36] The impatience of those individuals currently holding positions in the Department of Justice with the modicum of authority granted to them by Congress, cannot supply the plain lack of such authority with a claim for its "need" nor with a claim that is "appropriate" or "fitting".

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32. *United States* v. *Dickson*, 40 U.S. (15 Pet.) 141.

33. *Ex parte Curtis*, 106 U.S. 371.

34. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144.

35. *Carter* v. *Carter Coal Co.*, 298 U.S. 238; *Linder* v. *United States*, 268 U.S. 5, 22.

36. *Providence Bank* v. *Billings*, 29 U.S. (4 Pet.) 514.

II.

The Presence of the State of Mississippi As a Defendant Raises Serious Questions As to the Constitutionality of § 1971 under the Construction Contended for by the Government Which Can and Should Be Avoided in the Present Action.

A.

Congress Cannot Invade the Judicial Power by Requiring Courts to Accept an Irrational Presumption.

Section 1971 (c) undertakes to *deem* a criminal and unconstitutional act by a usurping individual to be the act of a sovereign State. It is on the strength of this legislative fiat that the Attorney General contends he is authorized to bring suit against the State and thus secure *"statewide relief, not confined to the counties whose registrars are joined"* (Brief for the U.S., p. 64). As an equal coordinate branch of the Federal government, this Court will not permit Congress to blind the courts to the proper exercise of their judicial power by any such irrational legislative pronouncement.[37]

This pronouncement proposes to make an act and deed of the State out of what was not its act or deed. It purports to give a null, void act or deed a modicum of temporary validity then simultaneously visit the act or deed upon a sovereign State, then hold the State to have acted illegally and contrary to the Constitution. A more positive non-sequitur is inconceivable.

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37. *Tot* v. *United States*, 319 U.S. 463, 468; *Bailey* v. *Alabama*, 219 U.S. 219, 238; and *Mobile, J. & K. C. Railroad Co.* v. *Turnipseed*, 219 U.S. 35, 43; cf. *Western & A. Railroad Co.* v. *Henderson*, 279 U.S. 639, 642-644.

The irrationality of the presumption is further shown by the fact that the statute seeks to impute *only the wrongful acts* of voting officials to the State. This is unreason run riot. If this presumption is rational, then two plus two may be *deemed* five and thirty Sundays *deem* a month. The statute has the double vice of making this irrational presumption *conclusive and irrebuttable.*

Suppose, *arguendo,* that the State could be made a co-defendant with a registrar in an action brought under the statute. In defense of the suit, the registrar could at least attempt to prove rightful, lawful and non-discriminatory action. But if this irrational presumption is given the full force and effect provided, the defendant State could not avail itself of any such lawful and proper acts of the registrar in its defense.

In *Manley* v. *Georgia,*[38] the Court summarized the law as to permissible legislative presumptions in this manner:

> "If the presumption is not unreasonable, and is not made conclusive of the rights of the person against whom raised, it does not constitute a denial of due process of law. . . . A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the 14th Amendment. . . . Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property."

The case most squarely in point with the present case is *Heiner* v. *Donnan.*[39] Under consideration there was § 302 (c) of the Revenue Act of 1926, 44 *Stat. at L.* 9, 70, which provided in pertinent part that a transfer of property made

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38. 279 U.S. 1, 9.

39. 285 U.S. 312, 328-329.

by a decedent within two years prior to death shall "be *deemed* and held to have been made in contemplation of death within the meaning of this title." The Court found that this statute attempted to create an irrebuttable presumption, and for that reason was unconstitutional. The pertinent reasoning appears in the following language:

> "The government makes the point that the conclusive presumption created by the statute is a rule of substantive law, and, regarded as such, should be upheld; and decisions tending to support that view are cited. The earlier revenue acts created a prima facie presumption, which was made irrebuttable by the later act of 1926. A rebuttable presumption clearly is a rule of evidence which has the effect of shifting the burden of proof, Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35, 43, 55 L. Ed. 78, 80, 32 L.R.A. (N.S.) 226, 31 S. Ct. 136, Ann. Cas. 1912A, 463, 2 N.C.C.A. 243; and it is hard to see how a statutory rebuttable presumption is turned from a rule of evidence into a rule of substantive law as the result of a later statute making it conclusive. In both cases it is a substitute for proof; in the one open to challenge and disproof, and in the other conclusive. However, whether the latter presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not and cannot be made to, exist in actuality, and the result is the same, unless we are ready to overrule the Schlesinger Case,[40] as we are not; for that case dealt with a conclusive presumption and the court held it invalid without regard to the question of its technical characterization. This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the 14th Amendment."

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40. *Schlesinger* v. *Wisconsin*, 270 U.S. 230.

This legislative deeming process is diametrically contrary to this Court's holding in *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371, 373-374, which was a suit to enjoin the Under Secretary of the Navy and the United States not to withhold certain payments. It alleged that the act under which the action was threatened was unconstitutional on many grounds. A three-judge district court dismissed the United States because of its sovereign immunity. On appeal to this court the holding, in pertinent part, was this:

> "Appellant contends that the action seeks to prevent a tort by the Secretary, acting as an individual and not as an officer of the government, consisting of a trespass against appellant's property, and that equitable relief is necessary because appellant has no adequate remedy at law and since it would otherwise suffer irreparable loss. Under our former decisions, had the factual allegations supported these contentions, the complaint, as filed would, in the absence of any further proceedings, have provided a basis for the equitable relief sought. See e.g., Philadelphia Company v. Stimson, 223 U.S. 605, 619-620, 32 S. Ct. 340, 344, 56 L. Ed. 570. For according to these cases, if we assume, as we must for the purpose of disposing of the jurisdictional issue, that appellant's allegations including the one that the Renegotiation Act is unconstitutional are true, the fact that the Secretary had acted pursuant to the command of that statute would have made no difference. These cases hold that *a public officer can not justify a trespass against a person's property by invoking the command of an unconstitutional statute. Under such circumstances, the tort becomes the officer's individual responsibility, and the government is not held to have sufficient interest in the controversy to be considered an indispensable party.*"

It is the contention of the Attorney General in the case at bar that he should be allowed to institute a suit

against the State of Mississippi because otherwise he cannot expediently obtain the relief which he feels is necessary. This Court laid just such a contention to rest in the *Heiner* case. In quoting from *Schlesinger* v. *Wisconsin*,[41] the Court said:

> ". . . 'The presumption and consequent taxation,' the court said (p. 240), 'are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, "A" may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against "B". Rights guaranteed by the federal Constitution are not to be so lightly treated; *they are superior to this supposed necessity*. . . .' "[42]

The Court in *Heiner* then went on to say:

> "To sustain the validity of this irrebuttable presumption it is argued, with apparent conviction, that under the prima facie presumption originally in force there had been a loss of revenue, and decisions holding that particular gifts were not made in contemplation of death are cited. This is very near to saying that the individual, innocent of evasion, may be stripped of his constitutional rights in order to further a more thorough enforcement of the tax against the guilty, *a new and startling doctrine, condemned by its mere statement* and distinctly repudiated by this court in the Schlesinger's Case (270 U.S. p. 240, 70 L. Ed. 564, 43 A.L.R. 1224, 46 S. Ct. 260) and Hoeper's Case (284 U.S. p. 217, ante, 248, 52 S. Ct. 120), cases involving similar situations. Both emphatically declared that such rights were superior to this supposed necessity."[43]

See also *Spieser* v. *Randall*, 357 U.S. 513, 523-524.

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41. 270 U.S. 230.

42. 285 U.S. at 325.

43. 285 U.S. 328.

The supposed necessity must fall here also for all of these same reasons and for the more cogent demand of the observation of a proper demarcation between the national and State sovereignties.

Another debilitating effect of this attempted invasion of the judicial power would be to impute a crime to a State through the fiction of "deeming" into existence an agency relationship which cannot exist. Title 18, *U.S.C.*, § 242, makes it a criminal offense to wilfully subject any inhabitant of a state to deprivation of constitutional rights because of race or color. The same elements necessary to form the statutory crime must be present to constitute a basis for statutory relief under § 1971. The willful element in the crime is supplied by necessary construction, since the deprivation of constitutional right protected by section 1971 includes only intentional or purposeful acts.[44]

If an individual, be he a legislator, judge or executive official acting contrary to his duties defined by statute, can make a State guilty of a criminal violation of United States law, such an individual would be possessed of a power to subject a State to criminal punishment and thus to an obvious destruction of its sovereignty. If this could be true as to a State, it could also be true as to the United States or any organ or branch thereof, including this Court. No individual can possess such power over a public institution or a sovereign.[45]

B.

There Is No Such Thing As a Bad State.

Within their respective spheres of authority, the individual states are equally sovereign with the limited

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44. *Snowden* v. *Hughes*, 321 U.S. 1.

45. *Texas* v. *White*, 74 U.S. (7 Wall.) 700.

government of the United States. The sovereignty of each of these governmental divisions is derived from the people.

> "The powers exclusively given to the federal government," it was said in *Worcester* v. *State of Georgia*, 31 U.S. (6 Pet.) 515, 570, "are limitations upon the state authorities. But with the exception of these limitations, the states are supreme; and their sovereignty can be no more invaded by the action of the general government, than the action of the state governments can arrest or obstruct the course of the national power."

In the License Cases Mr. Justice McLean stated:

> "There may be a limitation on the exercise of sovereign powers, but that State is not sovereign which is subject to the will of another. This remark applies equally to the federal and State governments. The federal government is supreme within the scope of its delegated powers, and the *State governments are equally supreme* in the exercise of those powers not delegated by them nor inhibited to them. From this it is clear, that while these supreme functions are exercised by the federal and State governments, within their respective limitations, they can never come in conflict. And when a conflict occurs, the inquiry must necessarily be, which is the paramount law? And that must depend upon the supremacy of the power by which it was enacted. The federal government is supreme in the exercise of powers delegated to it, but beyond this its acts are unconstitutional and void. So the acts of the States are void when they do that which is inhibited to them, or exercise a power which they have exclusively delegated to the federal government."

In *White* v. *Hart*,[46] the Court expressed itself in these words:

> "The national Constitution was, as its preamble recites, ordained and established by the people of the

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46. 80 U.S. (13 Wall.) 646, 650.

United States. It created not a confederacy of states, but a government of individuals. It assumed that the government and the Union which it created, and the states which were incorporated into the Union, would be indestructible and perpetual; and as far as human means could accomplish such a work, it intended to make them so. The government of the nation and the government of the states are each alike absolute and independent of each other in their respective spheres of action, but the former is as much a part of *the government of the people of each state*, and as much entitled to their allegiance and obedience as their own local state governments—"the Constitution of the United States and the laws made in pursuance thereof," being in all cases where they apply, the supreme law of the land. For all the purposes of the national government, *the people of the United States* are an integral, and not a composite mass, and their unity and identity, in this view of the subject, are not affected by their segregation by state lines for the purposes of state government and local administration. Considered in this connection, the states are organisms for the performance of their appropriate functions in the vital system of the larger polity, of which, in this aspect of the subject, they form a part, and which would perish if they were all stricken from existence or ceased to perform their allotted work."

In *Kohl* v. *United States*,[47] the eminent domain power of the national Sovereign was affirmed but with this express reminder that it was based on equal sovereignty:

"In Ableman v. Booth, 21 How. 523, 16 L. Ed. 175, Chief Justice Taney described in plain language the complex nature of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the Constitution of the United States, independent

47. 91 U.S. (1 Otto) 367, 372.

of the other. Neither is under the necessity of applying to the other for permission to exercise its lawful powers. Within its own sphere, it may employ all the agencies for exerting them which are appropriate or necessary and which are not forbidden by the law of its being."

In *Farrington* v. *Tennessee*, 95 U.S. 679, 685, this court said,

> "Yet every State has a sphere of action where the authority of the national government may not intrude. *Within that domain the State is as if the union were not.* Such are the checks and balances in our complicated but wise system of State and national policy."

> "The determination of the Framers Convention and the ratifying conventions to preserve complete and unimpaired state self-government in all matters not committed to the general government is one of the plainest facts which emerges from the history of their deliberations. And adherence to that determination is *incumbent equally* upon the federal government and the states. State powers can neither be appropriated on the one hand nor abdicated on the other." *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 295.

The contention that the sovereignty of the United States is a greater sovereignty than the sovereignty of the individual states is a fundamental error made by most who are imbued with the erroneous concept that increscent national federalism is the panacea for all ills.

In the true concept of our Constitution, *it is the people who are supreme* and their will, as recorded in the Constitution, defines the sovereignty of each governmental unit. The Federal Attorney General, in his brief, quotes a statement from *Sanitary District of Chicago* v. *United States*,[48] that a proceeding by the United States to enforce

48. 266 U.S. 405, 425.

the Constitution against a municipal service corporation "is not a controversy between equals". The statement is as apt in that case as it would be if the legal contest were one in which an officer of the United States was sued by a State to enforce the provisions of the Constitution in an area where the state functioned as *parens patriae*. The statement is taken out of context and is erroneous, if it is interpreted to mean that the sovereignty of the United States is superior to the sovereignty of the separate States. The unequals referred to in the statement must be taken as in reference to the Constitution, which is the superior of both. All of the sovereignties created under that document are *equally sovereign* in the respective areas committed to them.

Within their ambits of authority, each sovereign has the right to insist on freedom from intrusion from the other; for, as to its constitutional prerogatives, the interests of each is paramount. This is not justified by any process of reasoning based on the theory that the king can do no wrong. Rather, it finds its support in a proper and rational application of the concept that the will of the people as expressed in the Constitution must be served. For example, the people chose to constitute a Senate for the United States composed according to political boundaries without regard to population—no Federal or State executive, legislative or judicial authority or combination of such authorities can modify that method of composition, not even by amending the Constitution. The sole power to coin money was vested in the Federal Congress—this decision belonged to the people. The people chose to repose the sole power to ratify amendments to the Constitution in the legislatures of the various States—no authority can gainsay their wisdom. The United States was given powers of wider geographical dimensions than those reserved for the States, and its func-

tions were essentially different, *but the protection of the sovereignty of the one is just as essential to the accomplishment of the expressed will of the people as is the protection of the sovereignty of the other.*[49]

This court is firmly committed to the proposition that the line of demarcation between State and Federal sovereignty must be meticulously regarded, for its disregard would be vitally unconstitutional.[50] This is just as true when the construction of the Civil Rights Act is involved.[51] The Civil Rights Act should not be used to so centralize power as to upset the federal system.[52]

Another principle which is just as firmly entrenched in the jurisprudence of this nation is that there is a significant legal difference between the individuals who collec-

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49. In his concurring remarks in *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 363, Mr. Justice Johnson reasoned:

> "On the one hand, the general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers. Force, which acts upon the physical powers of man, or judicial process, which addresses itself to his moral principles or his fears, are the only means to which governments can resort in the exercise of their authority. The former is happily unknown to the genius of our constitution, except as far as it shall be sanctioned by the latter; but let the latter be obstructed in its progress by an opposition which it cannot overcome or put by, and the resort must be to the former, or government is no more.
>
> "On the other hand, so firmly am I persuaded that *the American people can no longer enjoy the blessings of a free government, whenever the state sovereignties shall be prostrated at the feet of the general government*, nor the proud consciousness of equality and security, any longer than the independence of judicial power shall be maintained consecrated and intangible, that I could borrow the language of a celebrated orator, and exclaim: 'I rejoice that Virginia has resisted.' "

50. *Texas* v. *White*, *supra*; *United States* v. *Constantine*, 295 U.S. 287, 296.

51. *Screws* v. *United States*, 325 U.S. 91, 108.

52. *Collins* v. *Hardyman*, 341 U.S. 651.

tively compose the government of a State and the intangible entity of the State itself. While these individuals—be they voting registrars, sheriffs, legislators or judges—are capable of committing acts, under color of office, which are classified as "state action" within the proscription of the 14th or 15th amendments, they are utterly incapable of binding the sovereign State itself by exceeding their statutory prerogatives.

In *Ex parte Virginia*,[53] the Court was considering a case involving a judge of a Virginia county court wherein he was charged with violation of a federal criminal statute for excluding negroes from jury service because of their race. Judge Coles was refused a writ of habeas corpus. This Court affirmed the correctness of Congress' action in enacting the statute under which the judge was prosecuted in this language:

> "But the Constitutional Amendment was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was given to Congress to enforce its provisions by appropriate legislation. *Such legislation must act upon persons, not upon the abstract thing denominated a State, but upon the persons who are the agents of the State in the denial of the rights which were intended to be secured.* Such is the Act of March 1, 1875, 18 Stat. at. L., 336, and we think it was fully authorized by the Constitution."

In *Poindexter* v. *Greenhow*,[54] this Court stated:

> "The state itself is an ideal person, intangible, invisible, and immutable. The government is an agent, and, within the sphere of the agency, a perfect representative; but outside of that it is a lawless usurpation.

53. 100 U.S. 339, 347.

54. 114 U.S. 270.

> . . . That which, therefore, is unlawful because made so by the supreme law, the Constitution of the United States, is not the word or deed of the State, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name."

The brief of the Attorney General contends that this basic constitutional principle is inapplicable to the present case because, although this action concerns individual and personal rights[55] it proceeds in the name of the United States and is therefore unaffected by the 11th Amendment. Their brief characterizes the State as a "convenient collective" and as a mere "short-hand". They remind the Court that the minority opinion below denominated this great legal and constitutional principle as "11th Amendment dialectic". They further point to the case of *United States* v. *Louisiana*,[56] where the Court took the position that it was "[a] necessary fiction to *accommodate* the 11th Amendment . . .". Obviously the word "accommodate" is used there in the sense of adapting that amendment to the immediate purposes of the opinion.

The history of the adoption of the Eleventh Amendment to the Constitution of the United States clearly teaches its significance and meaning as a limitation on the exercise of the judicial power which the people desired. It is of equal strength and constitutional vitality with every provision of the 14th or 15th Amendments.

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55. See *Reynolds* v. *Sims*, 377 U.S. 533; *United States* v. *Bathgate*, 246 U.S. 220, 227, and *South* v. *Peters*, 339 U.S. 276, 280; Cf. *Hague, Mayor, et al.* v. *Committee for Industrial Organization*, 307 U.S. 496, and also Judge Brown's dissenting remarks (R. 1566): ". . . [The action as alleged in the complaint] is between all Negro adults and the State." This reasoning is the basis for his view that it is "fitting" that the United States be permitted to sue the State.

56. 225 F. Supp. 353, 357.

This Court should not cheapen its decisions and those of the other courts who have so long announced and adhered to this great constitutional principle. To characterize it as mere dialectic or short-hand is obviously to make it merely an ingenious or a sophisticated device to "accommodate" expediency and to knowingly commit a violation of the 11th Amendment. It would be ridiculous to suppose that the Court would permit its decisional authority to be turned off and on like a light merely to suit the convenience of litigants circumstanced differently.

The 11th Amendment was not asserted as a bar to this action by The State of Mississippi.[57] However, the very same meanings and principles of Constitutional Law which this Court has applied to permit suits by individuals against errant officials acting under color of law, must obviously control the determination in this case that no right of action exists against The State of Mississippi on account of such erroneous actions.

Nothing could be further from truth or precept than the rash assumption in the brief for the United States that because the United States is the nominal plaintiff "the State itself may be seen to have committed wrongs which require correction."[58] *There is no such thing as a bad*

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57. It is not beyond consideration however that the amendment could be a bar to the joinder of the State. The action filed is clearly one to enforce personal and individual rights of a class of private citizens. How can the assertion of rights that belong to various members of a class by someone not a member of the class operate to extend and amplify such rights beyond the extent of those rights as possessed by the members of the class themselves? *McCabe et al. v. Atchison, T. & S. F. Railway Co. et al.*, 235 U.S. 151.

58. p. 63. This statement is also completely inconsistent with the following statement on page 61 of the same brief: "Under Section 601(b), the State is sued *only because* the responsible officials are unknown or may withdraw and lose their identities."

State, just as there is no such thing as a bad court or a bad office. Evil, froward men may secure positions of public trust and may misuse the offices which they secure. Their usurpations and excesses are none the less personal even where, under color of their office, the majesty and power of the sovereign they serve is necessary to enable them to bring their corruption to fruition. They cannot despoil the State, the Court or their office. Whether they are removed or their actions are corrected, the sovereignty they serve must and does continue completely unimpaired. Neither sententious prose nor catchy alliteration can subvert established constitutional principles.

C.

The Court Will Not Anticipate a Question of Constitutional Law in Advance of the Necessity of Deciding It.

Precedents teach, without exception, that this Court will not adjudicate the constitutionality or unconstitutionality of any State or Federal enactment until it is *necessary* to determine such a constitutional question. The authorities in support of this proposition were recently collected in the case of *United States* v. *Raines,* 362 U.S. 17. The court set forth these respected rules of practice:

> "'. . . never to anticipate a question of constitutional law in advance of the necessity of deciding it;
>
> "'never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.';
>
> ". . . one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional . . .;

> "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases;
>
> ". . . a litigant may only assert his own constitutional rights or immunities."

The reasoning supporting these rules was stated in these words:

> "The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide *cases and controversies* properly before them. . . . This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in *actual controversies*.
>
> ". . . a limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were in fact *concretely presented*.
>
> ". . . application of this rule frees the Court not only from unnecessary pronouncement on constitutional issues, but also from *premature interpretations* of statutes in areas where their constitutional application might be cloudy."

None of the exceptions to the application of these rules is pertinent in considering the propriety of refusing to consider the constitutionality *vel non* of § 1971 as attempted to be applied to the State of Mississippi as a defendant here. The United States (and for that matter, the members of the class whose individual and personal rights are asserted) is not left without an effective remedy by the dismissal of the State. The enforcement officials—the

registrars—continue available as potential defendants in a proper proceeding for preventive relief. No relief could have been granted as to the State if it had not been dismissed.[59] The State is not about to leave the jurisdiction or otherwise become unamenable to suit if these other proper respondents were to disappear. If and when a situation arises in which registrars are not available for the relief which the statute authorizes, then and only then will the time be ripe to make such an adjudication.

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59. *United States* v. *Atkins, supra.*

CONCLUSION

The State of Mississippi is not a necessary party to the adjudication and decision of any question presented in this case. Its presence as a defendant raises substantial constitutional questions. While the presence of the State is in nowise necessary to the grant of effective relief, the resolution of the questions raised would require an abstract decision as to the constitutionality of 42 *U.S.C.* 1971. The State of Mississippi should have been dismissed. As to the State, the judgment of the District Court was correct and should be affirmed.

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